No. 17074

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK BRENHA, JR., *et al.*,

Appellants,

vs.

ALFRED J. SVARDA,

Appellee.

APPELLANTS' OPENING BRIEF.

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I.

Statement of Pleadings and Jurisdictional Facts.

Plaintiff-appellee filed his complaint in the District Court, alleging that he was a fisherman-cook injured on board a tuna clipper and seeking damages against his employer, based on claims of negligence and unseaworthiness of the vessel. Jurisdiction was founded upon the Jones Act, 46 U. S. Code 688, as to rights based on claims of negligence, and the general maritime law as to unseaworthiness. Trial was by court alone. [T. R. pp. 3-6], and the plaintiff-appellee obtained a judgment. [T. R. p. 22.]

A Notice of Appeal from this judgment was timely filed on May 2, 1960. [T. R. p. 61.]

II.

Statement of the Case.

Plaintiff-appellee was employed as a cook on board the tuna clipper "VIKING", owned by defendants-appellants. On June 28, 1958, the vessel was at sea and the crew was on a school of tuna, and the fishermen were in the fishing racks along the side and stern of the vessel. They were using fishing poles, line and a barbless hook. Plaintiff left the galley and went to the stern of the ship to join the crew. He had his own pole and line. After fishing for a short while and after landing a fish he had caught, the fish hook on his line caught in his eye, resulting in the loss of the eye.

The Court found that one of the chains holding the rack on which plaintiff was standing had given way before the accident; that the rack dropped about four inches; that the dropping of the rack caused plaintiff's position to shift, which in turn caused tension on the fishline, caused the hook to disengage, fly toward the plantiff and strike his eye.

Defendants-appellants contend that the dropping of the rack was not the proximate cause of the fish hook striking plaintiff's eye.

Defendants-appellants submit that the evidence shows that the rack dropped while the fish plaintiff caught was in the air, and before he landed it on deck.

After the rack dropped, plaintiff landed his tuna on the deck of the vessel.

Plaintiff then pulled forward on the pole in order to slide his fish towards him. The purpose of pulling on the pole was to bring the tuna close enough to him so

that he could reach out, grab the slack line, and jerk the hook out of the fish's mouth, or otherwise remove it.

As plaintiff pulled forward on the pole, the hook came out.

The hook did not come out when the rack dropped, nor did the dropping of the rack cause any unusual tension on the line. The hook came out later. The two independent and intervening acts of the plaintiff which were made between the time the rack dropped and the hook came out of the fish's mouth were as follows: first, plaintiff accomplished the landing of the fish on deck by leaning backwards to bring the fish on to the boat, and, second, he then reversed the movement of his body by bending forwards and pulling the pole forward so as to slide the fish along the deck and over to him.

Defendants submit that the dropping of the rack could only have lowered the plaintiff and his pole and thus caused a slack in the line and not a tension. This slack in the line occurred when the fish was in the air and did not cause the hook to come out. To the contrary, the fish was landed safely on deck with the hook still in his mouth. Then when plaintiff made his jerk or pull forward to bring the fish over to him, then and only then did tension occur on the line, and following that tension the fish hook came out and hit the plaintiff.

III.

Specification of Error.

The District Court erred in finding that the parting of the eyebolt of the chain holding the fishing rack on the stern of the "VIKING" was a proximate cause of plaintiff's injury.

The finding of fact in question on this appeal is No. 8 [T. R. p. 17] and is as follows:

> "8. That as a result of the foregoing, on June 28th, 1958, when plaintiff was in the act of catching and landing a fish from the center stern rack of the vessel "VIKING", the eye-bolt on the port side of the rack to which the chain holding the outboard edge of the rack was attached broke and gave way because of its corrosive condition, with the result that the platform of the rack suddenly dropped down, the plaintiff was thrown off balance causing him to partially fall down, and the seaman fishing next to plaintiff fell against him; that the sudden dropping of the rack, the unstable condition of the platform and the plaintiff falling off balance prevented the plantiff from completing the landing of the fish in the normal manner and caused the fish hook to be pulled from the mouth of the fish and to enter the plaintiff's eye.
>
> "That the events from the hooking of the fish until the fish hook entered plaintiff's eye, occupied at most only 2 or 3 seconds of time; that it was during this short interval that the fishing rack gave way that the fish had been landed on the deck when unusual tension occurred on the fish

line; that upon the landing of the fish on the deck the line would ordinarily be slack or under little tension; that the plaintiff's face was turned toward the rear to pull the fish toward him and disengage the hook; that such unusual tension on the fish line caused the hook to disengage from the fish's mouth and fly toward the plaintiff and into the plaintiff's eye; that such unusual tension on the fish line was caused by plaintiff's shift in position in turn caused by the dropping of the fishing rack.

"That at the time the plaintiff was using the proper technique of fishing, and if the rack had not dropped down and the plaintiff had had a stable footing, he would have been able to land the fish in the normal manner and fish hook would not come near the plaintiff's head or his eye; that in the ordinary course of events, when a fisherman is using a proper procedure in the landing and catching of a fish and he is fishing from a stable rack, his own fish hook will not come in the vicinity of or enter his own eye; that the unstable and unsafe condition of the rack from which the plaintiff was fishing proximately contributed to and caused the plaintiff's injury."

IV.
Argument.

SUMMARY: The evidence is without conflict that the alleged dropping of about four inches of the fishing rack, on which plaintiff was standing, happened when plaintiff had a tuna on his line, and plaintiff was bringing the fish from the sea onto the deck of the boat. The fish was in the air, on the hook, when the rack dropped. The hook did not come out of the fish's mouth.

Next, the plaintiff leaned back, using his weight and body to bring the fish in, and he landed the fish on the deck of the boat, which was in back of him.

Then, as the next step, the plaintiff reversed his body movement and leaned forward with the pole, and he pulled or jerked forward with the pole, in order to cause the fish, which was still on his hook, to slide along the deck towards him. At this moment, as plaintiff pulled the fish to him, the hook flew out of the fish's mouth and caught the plaintiff's eye.

The dropping of the rack did not cause the hook to fly out of the fish's mouth. *When the rack dropped, the hook remained in the mouth of the fish.* After the rack dropped, the plaintiff landed the fish on the deck in back of him. The hook was still in the fish when plaintiff voluntarily and intentionally jerked or pulled on the pole in order to bring the fish to him so that he could remove the hook. The hook came out only after he made this jerk or pull on the pole and it was this jerk or pull that created the tension necessary to cause the hook to fly out and strike the plaintiff.

We submit that the effect of the dropping of the rack had spent itself, and was not in fact a cause of

the hook striking the plaintiff's eye. Since the drop of the rack occurred when the fish was still in the air, if it caused the tension which pulled the hook out, the fish would either have fallen back in the sea, or dropped on deck and plaintiff would not have made the jerk or pull to bring the fish over to him; his line would have been free.

A. The Evidence on Proximate Cause.

The only evidence in the record as to the events that led to the accident is in the testimony of plaintiff. [T. R. pp. 159-238.] In analyzing plaintiff's evidence, we will quote his testimony to show that from the time he hooked his fish to the time he was struck in the eye, plaintiff made three distinct operations, which were usual and normal to his method of fishing. The dropping of the rack happened during the first operation, and did not cause the hook to come out of the fish. It had no effect on the second operation of landing the fish, and none on the third of pulling forward on the pole to bring the fish to him.

First. The rack dropped after plaintiff had hooked his fish, and was bringing it into the boat, *the fish being in the air at the time the rack dropped.*

[T. R. p. 209]:

"Mr. Belli: Where was the fish when you felt the rack give way?

The Witness: The fish could have been in the air, sir, because I felt it all at one time, it all happened so fast that just the exact—

Mr. Belli: In the air where?

The Witness: *It would be flying through the air, because I know something gave way underneath me.*

Mr. Belli: Well, you made a motion there. Was the fish in front of you or in back of you *in the air* when it gave way?

The Witness: No, sir, I couldn't tell you just whether the fish would have been in front of me. It was on the pole, sir, I know. That I do know definitely." (Italics added.)

By Mr. Lande:

"Q. What do you mean, it was on the pole? A. *It was in the air . . .*" (Italics added.)

Second: The plaintiff then landed his fish on the deck of the fishing boat, which was in back of him (when fishing, plaintiff faced the sea, with his back to the boat). To accomplish the landing of his fish, plaintiff leaned back with his pole, and brought the small of his back against the stern rail. [T. R. pp. 205-206.]

[T. R. p. 207]:

"Q. All right. Now in this case, at the time you were hurt, you brought your fish back and it hit the deck, didn't it? A. Yes.

Q. *And it hit the deck before the hook came out?* A. *Yes, sir.*" (Italics added.)

Third: After plaintiff landed the fish on the deck in back of him, he then pulled his pole forward in order to slide the fish to him. [T. R. p. 219.] But, *as he moved forward with his pole, the hook flew out of the fish's mouth* and struck him.

[T. R. p. 208]:

"The Court: Now show me in slow motion just how you *landed* this fish. Now go slow.

The Witness: Well, naturally you've got it up in the air, and you put all your pressure—because it's a heavy fish you pour all your weight back. As I brought it in, *I was going to pull it toward me, which I started, and then all of a sudden the hook flew right directly into the eye, sir.* It all happened . . ." (Italics added.)

After the fish was landed on the deck, the plaintiff wanted to pull it towards him,

". . . I was going to pull it toward me, *which I started.* . . ." [T. R. p. 208.]

Only after plaintiff had exerted this pull, or tension on the fish line, did the hook come out of the fish's mouth.

The effect of the rack dropping had spent itself. Plaintiff landed his fish on the deck, with the hook still remaining in its mouth, and then plaintiff made his next usual move.

[T. R. p. 193]:

(Svarda) ". . . just as I pulled forward naturally I'm going to unhook the fish, and then boom. It all just happened so fast."

The unusual thing that happened here was that the hook came out as plaintiff pulled the fish to him; normally, he said:

[T. R. p. 104]:

"Well, you turn around and you pull the fish to you, but you turn around and you reach over the rail and unhook it out of its mouth."

[T. R. p. 194]:

"Q. I see, now what was unusual in the way the hook came out this time as compared to the normal way you would do it? A. Well, sir, the only think I know, as I brought the fish in, and I was leaning *back,* which you have to, to bring it in, and I felt the rack give way, and then the next thing I know *I'm going to pull forward to me* so I can turn around but I'm in that position, and the next thing I know the hook is in the eye." (Italics added.)

Finally, the following testimony of Mr. Svarda concisely shows that after the fish was landed on the deck, he pulled the fish to him and then the accident happened:

[T. R. pp. 209 and 210]:

"Q. Isn't it true that after you got the fish over your shoulder and it hit the deck or came on the deck that you, yourself, then jerked the pole to get the fish loose? A. No., sir, you don't jerk to get the hook loose. You either pull it toward you, or jerk it. *Sometimes it will come out,* but very seldom.

Q. I am talking about the moment of the accident. Immediately prior to the accident didn't you jerk that pole to take the hook out of the fish's mouth? A. No, I couldn't . . . *I pulled the fish toward me, that I know.* But it all happened so fast, sir, its. . . ." (Italics added.)

This movement of pulling the fish to him, which preceded the accident was a usual and normal action by

Svarda. The Court questioned Svarda as to his usual procedure.

[T. R. p. 214]:

"The Court: All right. *But what about after the fish hit the deck?* Do you then follow the practice, when you are fishing with live bait, to jerk the line to get your hook loose?

The Witness: Well, sir, you jerk the line to you, or your pole.

The Court: I don't mean pulling the line up to you. I mean when you land a fish, then do you give it a jerk to take the hook out?

The Witness: No, sir, you'd usually just give a jerk to pull it up toward you.

The Court: You mean you would pull the fish up to you.

The Witness: Yes, sir, you'd pull it toward you, because if it goes the complete length of you—

The Court: You don't try to jerk it; what you're trying to tell me is more of a pull.

The Witness: Yes sir, its more of a pull." (Italics added.)

[Again at T. R. p. 218]:

"The Court: And this pull, after the fish has hit the deck, this pull you talk about to bring the fish toward you is a pull enough to make the fish slide over the other fish on the deck up toward the rail?

The Witness: Yes, sir, toward you.

The Court: And it's not a jerk, with the idea of jerking the hook out of its mouth?

The Witness: Well, sir, I said 'jerk,' but what you normally would do is naturally there is a certain little amount of jerk because you're going to pull, and then you pull it toward you."

[At T. R. p. 219]:

"A. Well sir, the way I do sir, after I land a fish I'll naturally give a little pull, and while I'm doing that I'm turning around and I've got my line and I've got my fish skidding."

At page 232:

"Q. Well, where did the fish go after you pulled it out of the water? A. Well, it came in, I imagine, the rail. I believe so now. It hit the rail, I know. *Anyway, I am back, and the fish is back, and I made a jerk, you know, as you do—you got a tendency to do that, and then boom!* That's all I know." (Italics added.)

At page 234:

"A. Because I was off to one side, *and the fish come in, and I know I gave some kind of jerk* because I wanted to get back, you know, to try to get ahead, and I know the hook flew. That's all I know.

Q. And the hook flew? A. The hook flew and it caught me in the eye. It all happened in a split second, I mean I don't even know.

Q. As you jerked the pole, why did you jerk the pole? A. Well, a lot of times you do when you bring in a big fish, *because you can unhook it.*" (Italics added.)

[Plaintiff had a heavy fish on his hook. T. R. p. 204.]

Plaintiff's own testimony, which is the only evidence on the subject, proves that the cause of the hook flying out of the fish's mouth was the jerk or pull that plaintiff gave his pole.

There isn't the slightest evidence that the dropping of the fishing rack produced or brought about a pull on the fish line and disengagement of the fish hook. Plaintiff testified consistently that only after he pulled on the line did the fish hook come out and hit him.

The trial courts finding of fact, No. 8, is therefore without foundation in the record and is contradicted by the record.

B. The Errors in the Finding of Fact No. 8.

Finding of fact No. 8 contains the findings as to proximate cause. [T. R. p. 17.]

The Court found:

> ". . . that the fish had been landed on deck when unusual tension occurred on the fish line; . . ."

Plaintiff has told in exact words why there was tension on the fish line after the fish had been landed on deck. Plaintiff said, not once, but many times, in answer to questions by his counsel, by the Court, and by counsel for defendants, that he *jerked or pulled the fish to him* and when he did so, the hook flew out of the fish's mouth. [T. R. pp. 208, 210 and 234.]

Plaintiff did not testify, nor is there any other testimony, that the rack dropped *after* the fish was on deck,

and that this dropping of the rack caused him to jerk the line and cause the hook to fly out of the fish's mouth.

There simply is no evidence in the record whatsoever that after the fish had been landed, an *unusual* tension of the fish line occurred. The testimony is squarely to the contrary. Plaintiff created the tension when he pulled on the line in order to bring the fish to him.

The plaintiff leaned back because that was the normal way to use his weight to bring in the fish. When he leaned back, the small of his back was against the stern rail of the boat. [T. R. p. 206.] It was when he was in this position that he claims the rack dropped. Plaintiff says that he fell [T. R. p. 193], *but the fall did not interfere with the landing of the fish on deck, and thereafter plaintiff made his usual pull forward of the fish pole to get the fish to him.*

[T. R. p. 207]:

"Q. Did you have your face turned around in back at all? A. To my right, *naturally,* sir.

Q. As you brought it over your shoulder and the fish hit the deck, you were then in a position where you were laying back. A. Yes sir." (Italics added.)

[T. R. p. 217]:

"The Court: Well, when you say keep your head to one side and not turn your face, do you mean you keep your face to the water?

The Witness: Nor. sir, *you have to turn when you bring them in,* there's a certain amount there, because you've got to see where you're going.

The Court: Well, as you bring your fish in—we'll say you're throwing him over your right shoulder—*your face ordinarily turns a bit to the right* to see that your fish is landed.

The Witness: Yes, sir." (Italics added.)

So the fact that plaintiff's face was turned to the right, in the direction that he landed his fish, and from whence the hook came flying, was a result of his normal procedure, and not caused by any shift in position caused by the rack dropping.

V.
Memorandum of Law.

The burden of proof as to proximate cause is on the plaintiff. Speculation is not sufficient basis for a recovery; substantial evidence on all elements of his case must be offered by the plaintiff.

a. In *Hawley v. Alaska Steamship Co.,* 236 F. 2d 309 (C. A. 9th), this Court of Appeals had before it a case under the Jones Act. The trial court had granted defendant-appellee's motion for judgment of dismissal for insufficiency of the evidence to prove the alleged cause of action. The facts of the case are quite analogous to the present case; plaintiff claimed an unsafe place to work. His argument was as similar to that here; the court failed to apply a "liberal construction" to the definition of negligence as required by the Jones Act.

The Circuit Court Judge Bone writing the opinion, met the plaintiff's argument square on:

"(1) 'A mere scintilla of evidence is not enough to require the submission of an issue to the jury.' " *Gunning v. Cooley,* 1930, 281 U. S. 90, 94, 50 S.

Ct. 231, 74 L. Ed. 720, quoted in *Deere v. Southern Pacific Co.,* 9 Cir. 1941, 123 F. 2d 438, 440, certiorari denied 1942, 315 U. S. 819, 62 S. Ct. 916, 86 L. Ed. 1217; *De Zon v. American President Lines,* 9 Cir., 1942, 129 F. 2d 404, certiorari granted 1942, 317 U. S. 617, 63 S. Ct. 160, 87 L. Ed. 501, affirmed 1943, 318 U. S. 660, 63 S. Ct. 814, 87 L. Ed. 1065, rehearing denied 319 U. S. 780, 63 S. Ct. 1025, 87 L. Ed. 1725. There must be substantial evidence offered by plaintiff to justify submission of the case to the jury. *United States v. Holland,* 9 Cir., 1940, 111 F. 2d 949; *Galloway v. United States,* 9 Cir., 1942, 130 F. 2d 467, certiorari granted 1943, 317 U. S. 622, 63 S. Ct. 437, 87 L. Ed. 504, affirmed 1943, 319 U. S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458, rehearing denied 1943, 320 U. S. 214, 63 S. Ct. 1443, 87 L. Ed. 1851; *Carew v. R. K. O. Radio Pictures,* D. C. D. D. Cal. 1942, 43 Fed. Supp. 199. While the Deere, De Zon and Galloway cases involved motions for directed verdict, and not for dismissal, appellant and appellee concede that the same rules for reviewing the evidence apply to both motions."

The Court quoted from the Supreme Court:

"Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonable possible inferences favoring the party whose causes attacked."

Calloway v. United States, 319 U. S. 372, 395, 63 S. Ct. 1077, 1089.

The Court then refers to the Ninth Circuit case of *Seville v. United States,* 163 F. 2d 296, which was likewise a Jones Act case. The *Seville* case is remarkably similar to the one now before the Court. In the *Seville* case a sling load of supplies hit the plaintiff, here a fish hook hit the plaintiff.

> "Appellant knew that the outward boom tip was not over the center of the sling board and that he would have to move away from the load because it would swing toward him when it was raised. Appellant did not move fast enough to escape the swing and it pushed him backwards causing him to fall. . . ."

The Court held that the seaman had not carried the burden of proof.

The plaintiff Hawley then attempted to argue that inexperienced cannery workers were in the hold with him.

> "He testified that an inexperienced crew 'might have been some help to sustaining the injury I got.' Even assuming that the other men working with appellant were inexperienced, there was an insufficient showing that the *proximate cause* of the injury was the presence of these inexperienced workers." (Italics added.)

The Court said further "The evidence as to *how* the pallet swung and *how* it hit appellant is vague."

In conclusion, the Court said:

> "From all of the testimony, we must agree with the trial court that the evidence was insufficient to take the case to the jury. Appellant's contention here is that under a liberal interpretation of

the Jones Act the lower court should have found sufficient evidence of negligence to send the case to the jury. Our decision in *De Zon v. American President Lines, supra,* 129 F. 2d pages 407-408, is relevant to this contention. We there stated:

"We are reminded by plaintiff that this act 'is to be liberally construed in aid of its beneficent purpose to give protection to the seaman and to those dependent on his earnings' (case cited), but we must also be mindful of the fact that although the Jones Act has given 'a cause of action to the seaman who has suffered personal injury through the negligence of his employer' (citation), still it does not make that negligence which was not negligence before, does not make the employer responsible for acts or things which do not constitute a breach of duty.'

"In *Freitas v. Pacific-Atlantic Steamship Co.,* 9 Cir., 218 F. 2d 562, 564, we said:

" 'The law does not impose upon the shipowner the burden of an insurer nor is the owner under a duty to provide an accident-proof ship. *Lake v. Standard Fruit & Steamship Co.,* 2 Cir., 185 F. 2d 354; *Cookingham v. United States,* 3 Cir., 184 F. 2d 213. In the condition of the record there was nothing other than speculation on which to base a verdict for the plaintiff.' "

In *Miller v. Farrell Lines,* 247 F. 2d 503, the Court of Appeals, Second Circuit, had this to say concerning plaintiff's argument here:

"In a suit under the Jones Act, it is necessary to show that the allegedly negligent act or omission

of the defendant caused, in whole or in part, the damage for which recovery is sought. *Rogers v. Missouri Pacific R. Co.,* 1957, 352 U. S. 500, 77 S. Ct. 443, 459, 1 L. Ed. 2d 493; *Fergusion v. Moore-McCormack Lines, Inc.,* 1957, 352 U. S. 521, 77 S. Ct. 457, 459, 1 L. Ed. 2d 511. The burden of showing this causation rests on the plaintiff. *Johnson v. New York, N. H. & H. R.R. Co.,* 2 Cir., 1952, 194 F. 2d 194, reversed on other grounds, 344 U. S. 48, 73 S. Ct. 125, 97 L. Ed. 77; *Pittsburgh S.S. Co. v. Pala,* 6 Cir., 1933, 64 F. 2d 198. In this case the plaintiff did not introduce evidence of any probative facts to show that the defendant's negligence played any part in Miller's loss of life. The jury was required to indulge in a series of speculations."

VI.
Conclusion.

It is submitted that the evidence shows without conflict that the drop of the fishing rack was not a proximate cause of the fish hook coming out of the fish's mouth and striking the plaintiff; that the District Court erred in so finding, and that the judgment should be reversed.

Respectfully submitted,

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